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U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 198 51592 Office: CALIFORNIA SERVICE CENTER Date: **NOV 18 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a garment import and export business. It seeks to employ the beneficiary permanently in the United States as a fashion production merchandiser. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director found that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 1, 1998. The proffered wage as stated on the Form ETA 750 is \$5,265.87 per month, which equals \$63,190.44 per year. On the petition, the petitioner stated that it was established during 1981 and that it employs eight workers.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from March 1995 to February 1996. The beneficiary stated that she has been unemployed since February 1996. The beneficiary does not, therefore, claim to have worked for the petitioner at any time since the priority date.

In support of the petition, counsel submitted partial copies of the petitioner's 1999 and 2000 Form 1120 U.S. Corporation Income Tax Returns and compiled financial statements for the 12-month period ending March 31, 2001. The tax returns show that the petitioner reports taxable income based on a fiscal year running from April 1 of the nominal year to March 31 of the following year.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies of financial statements to

demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage, and the compiled financial statements cannot be considered for that proposition.

The 1999 tax return, which covers the fiscal year from April 1, 1999 through March 31, 2000, shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$22,725 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$1,220,862 and current liabilities of \$797,657, which yields net current assets of \$423,205.

The 2000 tax return, which covers the fiscal year from April 1, 2000 through March 31, 2001, shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$58,893 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$1,060,369 and current liabilities of \$563,895, which yields net current assets of \$496,474.

On May 19, 2003 the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested that the evidence cover the years from 1998 through 2002.

In response, counsel submitted additional partial copies of the tax returns and financial statements previously submitted. Counsel also submitted the petitioner's Form 7004 Application for Automatic Extension of Time to file its fiscal year 2002 (April 1, 2002 through March 31, 2003) Form 1120 U.S. Corporation Income Tax Return. The petitioner requested an extension until December 15, 2003 to file its fiscal year 2002 return.

On April 21, 2003, the California Service Center issued another Request for Evidence. The Service Center requested that the petitioner submit complete Federal tax returns for 2001 and 2002.

In response, the petitioner submitted another partial copy of its 2000 tax return and a partial copy of its 2001 Form 1120 U.S. Corporation Income Tax Return. The 2001 tax return shows that during that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$76,851. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$2,598,048 and current liabilities of \$2,019,592, which yields net current assets of \$578,456.

On September 4, 2002 the California Service Center issued another Request for Evidence. The Service Center requested evidence to show the petitioner's continuing ability to pay the proffered wage beginning in 1998.

In response, the petitioner provided additional copies of its 1999 and 2000 tax returns. The petitioner also provided a copy of its 1998 tax return. That return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$10,097 during its 1998 tax return, which covered the

fiscal year from April 1, 1998 through March 31, 1999. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$1,119,998 and current liabilities of \$729,766, which yields net current assets of \$390,232.

On August 20, 2003 the director denied the petition, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits a brief. The substance of that brief is that the evidence submitted amply demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also submits complete copies of the petitioner's 1998, 1999, 2000, and 2001 tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary at any time since the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will

consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$63,190.44 per year. The priority date is June 1, 1998. During its 1998 fiscal year, the petitioner had a net profit of \$10,097. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$390,232. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 1998 fiscal year.

During its 1999 fiscal year, the petitioner had a net profit of \$22,725. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$423,205. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 1999 fiscal year.

During its 2000 fiscal year, the petitioner had a net profit of \$58,893. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of \$496,474. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

During its 2001 fiscal year, the petitioner had a net profit of \$76,851. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2001 fiscal year.

The Service Center requested various tax returns, including the petitioner's 2002 tax return, on May 19, 2003. As was noted above, the petitioner filed for an automatic extension until December 15, 2003 to file its fiscal year 2002 return. The appeal in this matter was filed on September 17, 2003, before that return, with the automatic extension, was due. The failure to provide the requested tax return is therefore excused.¹ No reason exists to suspect that the petitioner did not have the ability to pay the proffered wage during its 2002 fiscal year.

The petitioner submitted evidence sufficient to show that it had the ability to pay the proffered wage during each of the salient years. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.

¹ The petitioner did not provide a 2002 annual report or audited 2002 financial statements in lieu of the requested 2002 tax returns and did not give any reason for that omission. Although the petitioner did not so state, this office believes that 2002 annual reports or financial statements were then unavailable, either because they had not yet been produced or because the petitioner does not routinely produce an annual report or commission year-end audited financial statements. Further, the request for evidence did not specifically require the petitioner to provide 2002 annual reports or financial statements.